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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
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11 CYNTHIA KENDRICK, individually,  
12 and as successor in interest to her now  
13 deceased husband, GARY KENDRICK,  
14 Plaintiff,

15 v.

16 COUNTY OF SAN DIEGO; SAN  
17 DIEGO COUNTY SHERIFF'S  
18 DEPARTMENT; San Diego Sheriff  
19 WILLIAM GORE; San Diego Sheriff's  
20 Deputy STEVEN BLOCK; and DOES 1  
through 50,  
Defendants.

Case No.: 15cv2615-GPC(AGS)

**ORDER DENYING PLAINTIFF'S  
MOTION FOR CHUMAN  
CERTIFICATION**

21 Before the Court is Plaintiff's motion for *Chuman*<sup>1</sup> certification. (Dkt. No. 102.)  
22 Defendants filed an opposition. (Dkt. No. 104.) Plaintiff filed a reply. (Dkt. No. 105.)  
23 After a review of the briefs, and the applicable law, the Court DENIES Plaintiff's motion  
24 for *Chuman* certification.  
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28 <sup>1</sup> Chuman v. Wright, 960 F.2d 104 (9th Cir. 1991).

## Background

This 42 U.S.C. § 1983 action alleges numerous causes of action arising out of the shooting death of Gary Kendrick by Deputy Steven Block and the subsequent alleged seizure of Gary's wife, Cynthia Kendrick by Lieutenant Brown-Lisk, Detective Barnes, Detective Hillen, Sergeant Lopez, Deputy Norie, Deputy Collis and Deputy Worthington. (Dkt. No. 61.)

On March 14, 2018, the Court granted in part and denied in part Defendants' motion for summary judgment. (Dkt. No. 85.) Relevant to the instant *Chuman* motion, the Court denied Defendants' motion based on qualified immunity. (*Id.* at 24-31.<sup>2</sup>)

On the first prong of the qualified immunity analysis, the Court concluded that based on the facts alleged by Plaintiff, "Deputy Block acted unreasonably and violated Gary's constitutional right to be free from excessive force", (*id.* at 26), and that the seven individual Defendants acted unreasonably and violated Cynthia's constitutional right to be free from an unreasonable seizure. (*Id.*)

On the second prong as to whether the constitutional right was clearly established at the time of the challenged conduct, the Court held that as to Deputy Block, "it was clearly established that shooting Gary with his arms outstretched and parallel to the ground with a shotgun in one hand and a liquor bottle in the other hand, without any further movements or gestures, was a violation of Gary's Fourth Amendment rights to be free from excessive force" under *George v. Morris*, 736 F.3d 829 (9th Cir. 2013). (*Id.* at 30.) As to the claim for unreasonable seizure of Cynthia by the seven individual Defendants, the Court concluded that under *Maxwell v. Cnty. of San Diego*, 708 F.3d 1075 (9th Cir. 2013), it was clearly established that detaining, separating and interrogating Cynthia for hours was a violation of her Fourth Amendment right against unreasonable seizure. (*Id.* at 30-31.)

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<sup>2</sup> Page numbers are based on the CM/ECF pagination.

1 On April 11, 2018, Defendants filed a notice of appeal of the Court’s order on  
2 summary judgment. (Dkt. No. 97.) On May 9, 2018, the Court granted the parties’ joint  
3 motion to vacate all remaining pre-trial dates pending the outcome of Defendants’  
4 interlocutory appeal. (Dkt. Nos. 100, 101.) The Court also stayed the case for  
5 administrative purposes. (Dkt. No. 101.) On May 11, 2018, Plaintiff filed a motion for  
6 Chuman certification seeking a ruling that the interlocutory appeal is frivolous, that the  
7 Court retain jurisdiction over the entire action and proceed with trial. (Dkt. No. 102.)  
8 Defendants oppose.

### 9 Discussion

10 The United States Supreme Court has recognized a narrow exception that allows  
11 an interlocutory appeal of a denial of summary judgment based on qualified immunity.  
12 Mitchell v. Forsyth, 472 U.S. 511, 530 (1985). An appeal of an order denying qualified  
13 immunity “normally divests the district court of jurisdiction to proceed with trial[;]”  
14 however, under the Ninth Circuit’s decision in Chuman v. Wright, 960 F.2d 104, 105 (9th  
15 Cir. 1992), a district court “may certify the appeal as frivolous and may then proceed  
16 with trial[.]” Padgett v. Wright, 587 F.3d 983, 985 (9th Cir. 2009) (citing Mitchell, 472  
17 U.S. at 530). Under Chuman, “[s]hould the district court find that the defendants’ claim  
18 of qualified immunity is frivolous,” it “may certify, in writing, that defendants have  
19 forfeited their right to pretrial appeal, and may proceed with trial.” Chuman, 960 F.2d at  
20 105. If a district court certifies an appeal as frivolous, the defendant may then apply to  
21 the Ninth Circuit for a discretionary stay. Id. at 105 n.1.

22 “An appeal is frivolous if it is wholly without merit.” United States v. Kitsap  
23 Physicians Serv., 314 F.3d 995, 1003 n. 3 (9th Cir. 2002) (quoting Amwest Mortgage  
24 Corp. v. Grady, 925 F.2d 1162, 1165 (9th Cir. 1991)). A qualified immunity claim is  
25 frivolous if it “is unfounded, so baseless that it does not invoke appellate jurisdiction.”  
26 Marks v. Clarke, 102 F.3d 1012, 1017 n.8 (9th Cir. 1996) (citation omitted). An appeal  
27 of qualified immunity defense may not be made based on whether there are genuine  
28 issues of material fact at issue. Rodriguez v. Cnty. of Los Angeles, 891 F.3d 776, 791

1 (9th Cir. 2018) (an appellate court has jurisdiction “over issues that do not require  
2 resolution of factual disputes, including in cases where officers argue that they have  
3 qualified immunity, assuming the facts most favorable to the plaintiff.”); Adams v.  
4 Speers, 473 F.3d 989, 990-91 (9th Cir. 2007) (the defendant “can make an interlocutory  
5 appeal from the ruling on immunity only if he accepts as undisputed the facts presented  
6 by the appellees”)).

7 Plaintiff argues that as to Deputy Block, Defendants’ appeal is frivolous as the  
8 Court properly denied qualified immunity based on clearly established law under George  
9 v. Morris, 736 F.3d 829 (9th Cir. 2013). As to the unreasonable seizure claim by  
10 Cynthia, Plaintiff argues that the case of Maxwell v. Cnty. of San Diego, 708 F.3d 1075  
11 (9th Cir. 2013) put the individual defendants on notice that their actions would violate the  
12 Fourth Amendment.

13 Defendants do not substantively challenge the denial of qualified immunity as to  
14 Deputy Block. Instead, they primarily argue that the Court’s order on qualified immunity  
15 as to the seven individual Defendant deputies and detectives who conducted an  
16 investigation after the incident are entitled to a separate determination that the law  
17 governing their actions was clearly established. They assert that the Court failed to  
18 consider the action of each person individually based on the facts known to each of them  
19 so it was “obvious to all reasonable governmental actors, in the defendant’s place, that  
20 what he is doing violates the federal law.” (Dkt. No. 104 at 2.) They argue that the seven  
21 deputies accused of an unlawful detention all acted based on different information and at  
22 different times. (Id. at 3.) In reply, Plaintiff argues that Defendants’ argument is a red  
23 herring as their argument relates to the sufficiency of the evidence and not a legal issue  
24 falling within the appellate court’s limited jurisdiction to hear an interlocutory appeal  
25 challenging a denial of qualified immunity.

26 When a defendant raises the defense of qualified immunity, the plaintiff bears the  
27 burden of showing that the right allegedly violated was clearly established. Isayeva v.  
28 Sacramento Sheriff’s Dep’t., 872 F.3d 938, 946 (9th Cir. 2017). To be clearly

1 established, “‘existing precedent must have placed the statutory or constitutional question  
2 beyond debate’ although there need not be a “‘case directly on point.’” White v. Pauly,  
3 137 S. Ct. 548, 551 (2017) (quoting Mullenix v. Luna, 136 S. Ct. 305, 308 (2015)). “An  
4 officer ‘cannot be said to have violated a clearly established right unless the right’s  
5 contours were sufficiently definite that any reasonable official in his shoes would have  
6 understood that he was violating it . . . .” City & Cnty. of San Francisco v. Sheehan, 135  
7 S. Ct. 1765, 1774 (2015) (quoting Plumhoff v. Rickard, 134 S. Ct. 2012, 2023 (2014)).  
8 Courts must not define “clearly established law at a high level of generality.” Ashcroft v.  
9 al-Kidd, 563 U.S. 731, 742 (2011). Instead, “the clearly established law must be  
10 ‘particularized’ to the facts of the case.” White, 137 S. Ct. at 552 (quoting Anderson v.  
11 Creighton, 483 U.S. 635, 640 (1987)).

12 In White, an officer met two women at an off ramp after they called 911 to report  
13 Daniel Pauly as a “drunk driver” who was “swerving all crazy.” Id. at 549. Two  
14 additional officers arrived after the women left. Id. While the officers agreed that there  
15 was no probable cause to arrest Daniel Pauly, they decided to speak with him to get his  
16 side of the story and find out if he was intoxicated. Id. White, the third officer, stayed  
17 behind at the off-ramp in case Daniel returned. Id.

18 The two officers the approached Daniel’s home and parked their cars without any  
19 flashing lights. Id. The officers saw lights on in the second house behind the first house  
20 and walked to that house. Id. They used their flashlights intermittently, and upon  
21 reaching the house, saw Daniel Pauly’s vehicle, and saw Daniel and his brother, Samuel  
22 Pauly, moving around inside the home. Id. The officers radioed White to join them. Id.

23 The Pauly brothers became aware of the presence of the officers and shouted out to  
24 inquire who they were. Id. The officers yelled back but the brothers did not hear the  
25 officers identify themselves as state police. Id. at 550. Instead, they heard someone  
26 yelling “We’re coming in. We’re coming in.” Id.

27 White parked at the first house and started walking up when he heard shouting  
28 from the second house. Id. He arrived as he heard one of the Pauly brothers say “We

1 have guns.” Id. White drew his gun and took cover. Id. Daniel fired two shots, and  
2 then Samuel pointed a handgun in White’s direction. Id. One of the officers fired at  
3 Samuel but missed and then White shot and killed Samuel. Id.

4 The Court held that Officer White who shot the victim did not violate a clearly  
5 established right. Id. at 552. While the appellate court recognized the facts in the case  
6 were unique due to Officer White’s late arrival on the scene, it nonetheless held that the  
7 law was clearly established at the time of Samuel’s death that a “reasonable officer in  
8 White’s position would believe that a warning was required despite the threat of serious  
9 harm.” Id. at 551-52. Disagreeing with the appellate court, the Court explained that  
10 “[c]learly established federal law does not prohibit a reasonable officer who arrives late  
11 to an ongoing police action in circumstances like this from assuming that proper  
12 procedures, such as officer identification, have already been followed. No settled Fourth  
13 Amendment principle requires that officer to second-guess the earlier steps already taken  
14 by his or her fellow officers in instances like the one White confronted here.” Id. The  
15 lower courts erred by failing “to identify a case where an officer acting under  
16 similar circumstances as [Defendants were] held to have violated the Fourth  
17 Amendment.” Id. at 552.

18 In a § 1983 action where individual civil liability is at issue, an officer can be held  
19 subject to personal liability “only for his or her own knowledge.” Ingram v. City of Los  
20 Angeles, 418 F. Supp. 2d 1182, 1190 (C.D. Cal. 2006) (citing United States v. Hensley,  
21 469 U.S. 221, 232 (1985)). In a subsequent decision in *Chuman*, the Ninth Circuit  
22 rejected the “team effort” theory that the trial judge instructed to the jury allowing the  
23 jury to lump the defendants together, rather than requiring the jury to make a  
24 determination as to each individual’s liability. Chuman v. Wright, 76 F.3d 292, 295 (9th  
25 Cir. 1996) (jury instruction error where “team effort” theory improperly removes  
26 individual liability and “allows a jury to find a defendant liable on the ground that even if  
27 the defendant had not role in the unlawful conduct, he would nonetheless be guilty if the  
28 conduct was the result of a ‘team effort.’”).

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2 Here, in her opposition to Defendants’ summary judgment motion, Plaintiff cited  
3 to Maxwell to argue that the law was clearly established that officers cannot detain,  
4 separate and interrogate the plaintiff for hours where there was no probable cause, no  
5 reasonable suspicion of a crime, no detention incident to a search and it was not to  
6 prevent the destruction of evidence. Id. at 1084-85. In Maxwell, while the specific issue  
7 of an individual inquiry as to each officer was not raised, the Ninth Circuit did not  
8 conduct an analysis as to each individual Sheriff’s deputy but lumped them in together as  
9 “Sheriff’s officers.” 708 F.3d at 1081, 1084 (“We conclude that the Sheriff’s officers  
10 were on notice that they could not detain, separate, and interrogate the Maxwells for  
11 hours.”).

12 The Court recognizes that clearly established law must be particularized to the  
13 facts of each individual defendant. See White, 137 S. Ct. at 552. However, officers in  
14 the subsequent chain of the alleged seizure may also rely on the conduct of prior officers  
15 that proper procedures were followed. Id. Therefore, as to the seven individual  
16 defendants on the unreasonable seizure claim by Cynthia Kendrick, the Court concludes  
17 the appeal is not frivolous and declines to certify it as such under *Chuman*.

18 On the issue of excessive force by Deputy Block, the Court disagrees with  
19 Defendants and concludes it is clearly established by the Ninth Circuit ruling in George  
20 v. Morris, 736 F.3d 829 (9th Cir. 2013) that Deputy Block’s conduct, relying on  
21 Plaintiff’s version of the facts, was a violation of the Fourth Amendment. Therefore,  
22 Defendants’ appeal of the qualified immunity ruling concerning Deputy Block is  
23 frivolous.

24 Because the facts underlying the qualified immunity analyses are intertwined as to  
25 all the Defendants, the case will be stayed pending resolution of the interlocutory appeal  
26 in order to conserve judicial resources.

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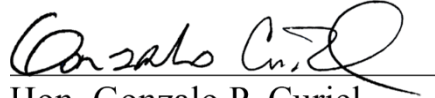
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1 **Conclusion**

2 Based on the reasoning above, the Court DENIES Plaintiff's motion for *Chuman*  
3 certification. The Court continues the STAY of the case in its entirety pending a ruling  
4 on Defendants' interlocutory appeal. The hearing set on July 13, 2018 shall be **vacated**.

5 IT IS SO ORDERED.

6  
7 Dated: July 10, 2018

8   
9 Hon. Gonzalo P. Curiel  
United States District Judge